



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF V-S-G-, INC.

DATE: AUG 5, 2019

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner sought to employ the Beneficiary as a software engineer. It requested classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Petitioner filed the Form I-140 petition on September 26, 2006. The Director of the Nebraska Service Center approved the petition on November 21, 2006. The Director subsequently sent the Petitioner a notice of intent to revoke (NOIR) the petition's approval, and on October 19, 2012, the Director revoked the petition's approval due to the Petitioner's failure to respond to the NOIR.

The Director later vacated the October 19, 2012, decision and certified the case to us. We remanded the petition to the Director for continued review and processing. The Director subsequently issued a NOIR to the Petitioner and the Beneficiary, and on February 28, 2017, the Director revoked the approval of the petition and invalidated the ETA Form 9089, Application for Permanent Employment Certification, after receiving no response to the NOIR. The Beneficiary filed a motion to reopen and motion to reconsider; the Director granted the motion; and on October 30, 2017, she affirmed the February 28, 2017, decision revoking the approval of the petition and invalidating the labor certification application. We dismissed a subsequent appeal on November 15, 2018. The Beneficiary then filed a motion to reopen and motion to reconsider, but the motions were denied as untimely filed.¹ The matter is now before us on a second motion to reopen and motion to reconsider.

Upon review, we will deny the motion to reopen and motion to reconsider.

I. MOTION REQUIREMENTS

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). Reasserting previously stated facts or resubmitting previously provided evidence does

¹ We also noted that the Beneficiary failed to address all grounds for dismissal of the appeal, and therefore, even if the Beneficiary's motions had not been late, we would still have denied for this reason. We will not discuss this alternative ground for denial in this decision, as the Beneficiary failed to overcome the primary reason for denying the prior motion, which was her failure to timely file.

not constitute “new facts.” A motion to reconsider must establish that our decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3).

In regard to the filing timelines, the regulation at 8 C.F.R. § 103.5(a)(1)(i) provides, in pertinent part:

Any motion to reconsider an action by [United States Citizenship and Immigration Services (USCIS)]... must be filed within 30 days of the decision that the motion seeks to reconsider. Any motion to reopen a proceeding before [USCIS]... must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires, may be excused in the discretion of [USCIS] where it is demonstrated that the delay was reasonable and was beyond the control of the [movant].

If the decision was mailed, the motion must be filed within 33 days. *See* 8 C.F.R. § 103.8(b).

II. ANALYSIS

When this case was last before us, we denied the motion to reopen and motion to reconsider as untimely filed, because the motions were received by USCIS on the 34th day after the appellate decision was issued. With her current motions, the Beneficiary does not dispute that the prior motions were filed untimely. Rather, the Beneficiary argues that we should excuse the prior motions’ late filing, because the late filing was due to “good cause” or “excusable neglect.”

In support of her motions, the Beneficiary submits a signed declaration from her counsel executed on May 15, 2019. Counsel declares: (1) on Monday, December 17, 2018, he prepared the filing of a motion to reopen and reconsider, placing it in a United Parcel Service (UPS) envelope with an Airbill for “next day morning delivery;” (2) he placed the package in a UPS box on the first floor of [REDACTED]; (3) the box indicated that the pick-up time was 8:45 p.m. Monday through Friday and that the contents had not yet been picked up that day; (4) he put the UPS package containing the motion in the box before 8:45 p.m. on Monday, December, 17, 2018; and (5) UPS advised him that they do not have a record of when the box was picked up that day because it was over 120 days prior. The Beneficiary also submitted a statement from UPS confirming that there is no information available for pick-ups made 120 or more days prior to an inquiry.

According to the Beneficiary, the timeline presented above demonstrates that UPS should have delivered the package to USCIS on Tuesday, December 18, 2018, the 33rd day, and if it had done so, the motions would have been timely filed. The Beneficiary therefore argues that the delay in mail service should excuse the late filed motions. In support of its argument, the Beneficiary cites to a number of federal court cases, including *Scarpia v. Murphy*, 782 F.2d 300 (1st Cir. 1986); *Wright v. Deyton*, 757 F.2d 1253 (11th Cir. 1985); and *Gibbs v. Town of Frisco City, Alabama*, 626 F.2d 1218 (5th Cir. 1980). According to the Beneficiary, courts in those cited cases have found that late filings due to delays in mail service may be excused for “good cause” and “excusable neglect.” The Beneficiary then cites to *Kennicott v. Sandia Corp.*, No. CIV 17-0188 JB/GJF, 2018 U.S. Dist. LEXIS

197717, at *29 (D.N.M. Nov. 20, 2018) for the proposition that the terms “good cause” and “excusable neglect” are assumed to have the same meaning in various statutory contexts.

However, the Beneficiary’s emphasis on these decisions is misplaced. The untimely filings discussed in the cited cases are governed by the Federal Rules of Appellate Procedure (F.R.A.P.). Under the F.R.A.P. Rule 4(a)(5)(A)(ii), a court may extend the time to file a notice of appeal if a party shows “excusable neglect” or “good cause.” In the proceedings before us, however, the timely filing of motions is governed by 8 C.F.R. § 103.5, not the F.R.A.P. As such, the concepts of “good cause” and “excusable neglect” are not relevant here. Rather, the correct inquiry is whether USCIS, in its discretion, finds that the delay in filing was reasonable and beyond the movant’s control. 8 C.F.R. § 103.5(a)(1)(i).

Importantly, the consideration of whether a delay is reasonable and beyond the movant’s control applies only to motions to reopen. USCIS regulations do not allow us to excuse untimely filed motions to reconsider. The Beneficiary appears to argue that the prior motion to reconsider’s untimely filing may be excused, but she has not submitted new facts to support this assertion, nor shown that our decision to deny the motion to reconsider as untimely was based on an incorrect application of law.

As required by the regulation, we will next discuss whether the Beneficiary has demonstrated that her delay in filing the prior motion to reopen was reasonable and beyond her control. Here, the Beneficiary was notified of the motion filing deadline and was allowed 33 days within which to properly file the motion. The regulations governing filings with USCIS are clear that the date of filing is the date of receipt at the appropriate location. 8 C.F.R. § 103.2(a)(7)(i). As such, the Beneficiary had full knowledge of what was required, but chose to wait until the last moment to submit the motion to an unattended mailbox on the evening before the motion was due. The Beneficiary does not claim that any circumstance beyond her procrastination affected her ability to mail the motion at an earlier time or date. Upon review of the record, we do not find that the late filing of the prior motion to reopen was reasonable and beyond the Beneficiary’s control. The evidence submitted by the Beneficiary does not establish that the prior decision to deny the motion to reopen as untimely was incorrect. Likewise, the Beneficiary’s arguments for reconsideration do not demonstrate that our prior decision to deny the motion to reopen was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. For these reasons, the Beneficiary has not shown proper cause to reopen or reconsider our prior decision.

III. CONCLUSION

The motion to reopen and motion to reconsider will be denied for the above stated reasons, with each considered an independent and alternative basis for the decision. The burden of proof to establish eligibility for the benefit sought remains with the petitioner in revocation proceedings. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Cheung*, 12 I&N Dec. 715 (BIA 1968); and *Matter of Estime*, 19 I&N Dec. 450, 452, n.1 (BIA 1987). The Petitioner has not met that burden.

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ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of V-S-G-, Inc.*, ID# 6276133 (AAO Aug. 5, 2019)